

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Small Company Rate)	
Increase Request of Mill Creek Sewers,)	<u>Case No. SR-2005-0116</u>
Inc.)	Tariff Work I.D. No. YS-2005-0330

**STAFF'S SUGGESTIONS IN SUPPORT OF
SECOND SUPPLEMENTAL AGREEMENT REGARDING
DISPOSITION OF SMALL COMPANY RATE INCREASE REQUEST**

COMES NOW the Staff of the Missouri Public Service Commission and, for its Suggestions in Support of Second Supplemental Agreement Regarding Disposition of Small Company Rate Increase Request, states to the Commission as follows:

Introduction

During Agenda discussions and on-the-record presentations in this case, the Commission has expressed considerable interest in the possibility of appointing a receiver for the Company. The Staff understands that the Commission especially seeks assurance that the revenues that the Company would receive as a result of the rate increase that it requested will be used solely for the legitimate operating expenses of the Company, and will not be diverted to the shareholders.

For reasons that are discussed below, the Staff does not believe the appointment of a receiver is a viable option at this time. But the Staff believes that the implementation of the Second Unanimous Supplemental Agreement, coupled with the Disposition Agreement and the first Supplemental Agreement, will provide the Commission with a receiver-like oversight of the Company's affairs that will ensure that the Company's ratepayers will receive safe and adequate service at a just and reasonable price.

The Statutory Requirements of Section 393.145, RSMo

Section 393.145, RSMo, which authorizes the circuit court to appoint a receiver for a sewer corporation that regularly provides service to 8,000 or fewer customers, is the principal avenue for seeking the appointment of a receiver for a company such as Mill Creek. This statute authorizes the Commission to petition the circuit court for the appointment of a receiver if it determines, after hearing, that the company “is unable or unwilling to provide safe and adequate service [or] has been actually or effectively abandoned by its owners.” If the Commission makes that determination, Subsection 2 of this newly revised statute authorizes the Commission to appoint an interim receiver for the corporation.

Thus, the Commission may only appoint an interim receiver if it orders its general counsel to petition the circuit court for the appointment of a permanent receiver. And it may only petition the circuit court for the appointment of a permanent receiver if it determines that the Company is unable or unwilling to provide safe and adequate service or has been actually or effectively abandoned by its owners. The Staff does not believe that either of these conditions currently exists.

Conditions for Appointment of Receiver Do Not Exist

As evidenced in the Status Reports that the Staff has filed in this case in the last six months, and in other pleadings and testimony in this case, the Company has made very significant investment in its plant. This investment could not be funded from the Company’s sewer revenues, but was paid from the personal funds of the owner of the Company.

The Company has also taken steps to correct the deficiencies that were noted on the Notice of Violation (NOV) that the Missouri Department of Natural Resources (MDNR) issued on July 6, 2005. At the Agenda on September 22, assistant attorney general Harry Bozoian

stated that the Company was still in violation of MDNR requirements. But he acknowledged that he based this statement on information that was current only as of July 9 – two-and-one-half months ago. The Staff has made numerous visits to the Company’s facilities since July 9, and has reviewed the Company’s response to the MDNR’s compliance letter related to the July NOV, and believes that the Company has corrected all of the deficiencies noted in the NOV, except for its failure to provide Daily Monitoring Reports in the past. It is, of course, not possible for the Company to retroactively provide those DMRs, so the Staff believes the Company has done all that it could do to correct the deficiencies.

In addition, the Company has recently rescinded the forfeiture of its corporate charter.

As the owner of the Company has invested his personal funds in improvements to the sewer plant, and the Company has corrected the violations noted by the MDNR and rescinded the forfeiture of its corporate charter, it cannot be said that the owners of the Company have actually or effectively abandoned the Company.

Furthermore, the Staff is of the opinion that the Company is providing safe and adequate service to its customers. Steve Loethen, of the Staff, has worked closely with the Company to improve the operation of the facilities, and has made frequent visits to the plant to monitor the performance of the plant. The Staff believes that the operational problems have been resolved.

Difficulty in Identifying a Receiver

Even if the Commission decided that the Company satisfied the requirements for appointment of a receiver, it might be very difficult to identify someone who would be willing to serve in this capacity. In another case now pending before the Commission, the Staff has not been able to identify a qualified person who is willing to act as a receiver, despite its diligent search for such a person over the past couple of months. Those problems are exacerbated in the

present case, because of the judgment that has been entered against Mill Creek for civil penalties, which has an unpaid balance of nearly \$500,000. The statements of Mr. Bozoian and of Kurt Schaefer, attorney for the Department of Natural Resources, at the September 22 Agenda, provide little comfort for someone who might contemplate serving as a receiver for Mill Creek. The Staff has not identified anyone who would be willing to serve as receiver, and believes it would be very difficult, and time-consuming, to do so.

The General Receivership Statute

It is possible that a circuit court could appoint a receiver under the general receivership statute, Section 515.240. Such an action would have to be ancillary to another pending legal or equitable proceeding, however, and the Staff does not know of any such proceeding, involving Mill Creek, that is now pending.

Voluntary Receivership

The Commission has also discussed the possibility of a voluntary receivership. It is not clear to the Staff what legal authority exists for such a proceeding. Any such receiver would have to be appointed by the circuit court, and it is not clear which statutes would govern the conduct of such a receiver. The Company has stated that it would consider a voluntary receivership, but only if the MDNR and AGO agree to eliminate the nearly \$500,000 balance due on the judgment against Mill Creek for civil penalties, and the MDNR and AGO stated at the September 22 Agenda that they are not willing to do that. It is not likely that the Company would voluntarily state that it is unable or unwilling to provide safe and adequate service or that the owner has abandoned the Company. And, as noted above, it might be very difficult to identify anyone who is willing to serve as receiver.

Financial Management by a Third Party

The Commission has also expressed interest in the possibility that Mill Creek might contract with a third party to handle the Company's financial affairs. To further investigate that possibility, the Commission issued an Order Directing Filing, on September 27, 2005, in which it directed Mill Creek to file a pleading setting forth the content of any discussions it has had with Testing Analysis and Control (TAC). Mill Creek filed a response to the Commission's order on September 28, 2005. The Company stated that TAC would consider assuming the additional obligations if the Commission approves the rate increase so the Company's revenues would be sufficient to meet its expenses. The Company did not, and probably could not, state how much TAC would charge for these services, or provide the other terms that would be included in such an agreement.

As the Staff noted in its Supplemental Recommendation for Approval of Tariff Revisions, Mill Creek's pending tariff rates do not include a return on its investment in its new treatment plant or the income taxes related to the return on that investment. The proposed rates, do, however, include the expenses related to the ongoing operation and maintenance of the treatment plant and the collection system. But they do not include any fees that the Company might have to pay to TAC for handling the Company's financial affairs. There would certainly be some charge for such a service, even though the amount of that charge is not yet known. As a result, the proposed rates might not be sufficient to allow the Company to recover all of its ongoing expenses. Furthermore, the possibility that revenues might not be sufficient to pay all such expenses might make TAC, or any other third party, reluctant to contract with Mill Creek to provide such services.

The Second Supplemental Agreement

The Staff believes that the Second Supplemental Agreement Regarding Disposition of Small Company Rate Increase Request, executed by the Company, the Staff and the OPC, would achieve the Commission's objectives, without the problems that are associated with the other proposals that are discussed above. This agreement would provide the Commission with a receiver-like oversight of the Company's affairs, and would ensure that the Company's ratepayers receive safe and adequate service at a just and reasonable price.

The Staff and the OPC would oversee the financial transactions by the Company on a monthly basis, to ensure that the Company's revenues are used only for the ongoing expenses of operating the Company, and would not be diverted to the Company's shareholders. If any revenues were used for any unauthorized purpose, the matter would promptly be brought to the attention of the Commission. The consequences of using these revenues for any unauthorized purpose would be dire, indeed: the Staff or the OPC could move that the rate increase be rescinded, and that the rates be reduced to their current level. If such motion were granted, it would reduce the rates from about \$30 per month to \$5.00 per month. This is a strong and sufficient incentive to ensure that the revenues would be used only for authorized purposes.

The other significant advantage that this Supplemental Agreement provides is that it would not result in any out-of-pocket expenditure by the Company, like the appointment of a receiver or the execution of a contract with TAC would. Under the Supplemental Agreement, Company officials would do the billing and collection work and pay for the ongoing expenses, subject to oversight by the Staff and the OPC. The services of the Staff and OPC are not free, of course, but the cost of providing them would not have to be borne by the Company or the

ratepayers. As a result, the Company's revenues should be sufficient to pay its ongoing expenses.

WHEREFORE, the Staff requests that, if the Company's response to the Commission's September 27 Order Directing Filing is not acceptable to the Commission, the Commission approve the Second Supplemental Agreement and approve the Company's pending tariff revisions, to be effective for service rendered on and after October 1, 2005.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered, transmitted by facsimile or e-mailed to all counsel of record on this 28th day of September, 2005.

/s/ Keith R. Krueger